SHARON BROWN,

Appellants

v.

BALTIMORE CITY BOARD
OF SCHOOL COMMISSIONERS,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 09-31

OPINION

INTRODUCTION

In this appeal, Appellant challenges the decision of the Baltimore City Board of School Commissioners (local board) to terminate her for misconduct for slapping a student in the face.

We transferred this case pursuant to COMAR 13A.01.05.07 to the Office of Administrative Hearings (OAH) for a hearing before an Administrative Law Judge (ALJ). The ALJ issued a decision proposing that the State Board affirm the local board's termination of Appellant. The Appellant has filed Exceptions to the ALJ's proposed decision. The local board has responded to the Exceptions.

FACTUAL BACKGROUND

Appellant has been a teacher for over 17 years. She has been employed by the Baltimore City Public School System (BCPSS) as a certified teacher since 2000. At the time of the incident at issue, Appellant was teaching at Coldstream Park Elementary/Middle School. (Coldstream).

On May 17, 2007, Appellant was involved in an incident in which Appellant ended up slapping a sixth grade female student across the face. The incident took place while Appellant was outside supervising some students in an activity. It was preceded by the following exchange between Appellant and Student B. Student B asked Appellant for the empty bottle that Appellant had been using. Appellant gave the student the bottle so that she could rinse it and refill it to use herself. Student B then showed Appellant a disciplinary note that Student B's math teacher had given her to take to the office. Student B admitted to Appellant that she had not taken it to the principal as she was supposed to do. Appellant told Student B that she was wrong. Student B replied that she should throw the water on Appellant. Appellant reminded Student B that she was nice enough to give her the water, to which Student B replied "shut the fuck up." Appellant then called the kids to come inside. (Hearing Examiner Decision at 7).

The "slapping incident" took place as the students were coming inside. The Appellant was standing with her back to a brick wall at a set of double doors which led in the school. She held open one of the doors and began calling the students back into school. Student B approached the Appellant and asked the Appellant what time it was. The Appellant indicated that she did not know the time. In response, Student B stated that she would check her own watch. In doing so, Student B brought the watch up towards and in close proximity to the Appellant's face. The Appellant directed Student B to back up because B was crowding the Appellant and had stepped on the Appellant's toes. Student B responded by telling the Appellant to "shut the fuck up". Appellant told Student B a second time to back up. Instead of backing up, Student B brought the watch towards the Appellant's face, placing it right next to the Appellant's eye. In response to this act by Student B, the Appellant slapped B across the face. Ms. W., the parent of another student, observed Appellant slap Student B across the face. Ms. W. observed Student B begin cry and walk away from the Appellant. Ms. W. reported the incident to the school's principal's office. Approximately five minutes after the incident both Ms. W. and the principal's secretary observed that Student B's face was red where she had been slapped by the Appellant. ALJ's Proposed Decision at 10-11.[1]

Coldstream's principal, Tracey Thomas, investigated the matter. As part of that investigation, Ms. Thomas conducted a meeting at which Appellant, Student B, and Student B's mother were present. Ms. Thomas removed Appellant from the classroom for the remainder of the 2006-2007 school year.[2] (T.103-104/OAH). She also recommended that Appellant be dismissed from her position. (CEO 3). She stated the following in her recommendation:

> [Appellant] continues to build inappropriate relationships with her students and allows her professional demeanor to become relaxed. therefore, they feel comfortable speaking and behaving improperly in her presence. Even when attempting to correct them, she does that using humor, sarcasm or profanity. She plays too much with her pupils and the lines of respect and professionalism are blurred or crossed. Students receive mixed signals, and problems occur in and outside of the classroom.

On or about June 20, 2007, the Chief Executive Officer (CEO) issued a Statement of Charges recommending Appellant's dismissal for professional misconduct to the local board. The CEO based the recommendation on the following reasons:

1. On May 17, 2007, [Appellant] admitted she slapped a female student in the face.

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[1]The ALJ's Findings of Fact are set forth on pp. 5-8 of the Proposed Decision.

[2]Appellant worked in the mail room through the end of the school year. (T.103/OAH).

2. [Appellant's] actions were not done in any attempt to restrain the student or to protect herself.

3. On previous occasions, Ms. Tracey Thomas, Principal, has overheard and observed inappropriate conversations and interactions between [Appellant] and students.

4. The student indicated that it was a matter of common practice that [Appellant] uses abusive language with students when conversing with them.

5. On March 28, 2006, [Appellant] was given a written reprimand for failure to manage her class in a professional manner.

6. On [Appellant's] 2003-2004 annual evaluation, she was cited for failing to interact professionally, ethically, legally, and/or respectfully with parents and/or students.

(Statement of Charges).

Oddly, after the Statement of Charges was issued, Appellant was transferred to a teaching position at Sarah M. Roach Elementary School for the 2007-2008 school year. She was also later promoted to the position of Instructional Team Associate at Patterson Senior High School in February 2008.

Meanwhile, Appellant sought review of the Statement of Charges. Hearing Examiner, Robert J. Kessler, conducted a hearing on March 20, 2008.[3] He recommended that Appellant remain in her position and that no further action be taken by the local board based on a perceived procedural error. Specifically, the parties had failed to admit the CEO's Statement of Charges as evidence in the case. The Hearing Examiner found, therefore, that the CEO never took any administrative action on the principal's recommendation for termination and there was nothing for the local board to act upon.

On May 13, 2008, the local board issued an Order terminating Appellant from her teaching position at Coldstream Park Elementary School. After the Appellant filed her initial appeal to the State Board alleging that the local board failed to provide a rationale for rejecting the Hearing Examiner's decision, the local board issued an Amended Order explaining that it terminated Appellant because she admitted to slapping a student in the face and because the Hearing Officer found that Appellant reacted by slapping the student in the face. (Amended Order, 7/7/08).

This appeal to the State Board followed and we transferred the matter to OAH for a full evidentiary hearing pursuant to COMAR 13A.01.05.07A(2).

[3]The matter was rescheduled from its original hearing date on November 20, 2007.

ALJ's DECISION

The ALJ issued a Proposed Decision recommending that the State Board uphold the local board's decision to terminate Appellant for misconduct. The ALJ determined that Appellant engaged in misconduct when she slapped a student across the face without justification in violation of State law and local board policy prohibiting corporal punishment. In so finding, the ALJ rejected the Appellant's self-defense argument. The ALJ also determined that termination, and not a lesser punishment as argued by Appellant, was the appropriate penalty given the circumstances. (ALJ Proposed Decision).

STANDARD OF REVIEW

Because this appeal involves the suspension of a certificated employee pursuant to § 6-202 of the Education Article, the State Board shall exercise its independent judgment on the record before it in determining whether to sustain the suspension. COMAR 13A.01.05.05(F)(1) and (2). The local board has the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05(F)(3).

The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify, or remand the ALJ's Proposed Decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications, or amendments to the Proposed Decision. *See* Md. Code Ann., State Gov't § 10-216. In reviewing the ALJ's Proposed Decision, the State Board must give deference to the ALJ's demeanor based witness credibility findings unless there are strong reasons present that support rejecting such assessments. *See Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994).

ANALYSIS

Misconduct

Section 6-202 of the Education Article provides the grounds and procedure for suspension and dismissal of teachers, principals, and other professional personnel. It sets forth the five grounds for suspension or termination: (1) immorality; (2) misconduct in office; (3) insubordination; (4) incompetency; and (5) willful neglect of duty. §6-202(a)(1)(i – v).

The issue in this case is whether or not Appellant's conduct on May 17, 2007 rises to the level of misconduct. In *Resetar v. State Board of Education*, 284 Md. 537 (1979), the seminal teacher misconduct case, the Court of Appeals reviewed how misconduct has been defined or applied in a variety of sources, including cases from other jurisdictions. The Court stated that misconduct is "sufficiently comprehensive to include misfeasance as well as malfeasance, and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful."

Id. at 560-561 (*citing* 58 C.J.S. Misconduct §818 (1948). The Court also noted that a teacher's conduct must bear on the teacher's fitness to teach in order to constitute misconduct. 284 Md. at 238, *citing Wright v. Superintending Sch. Com., City of Portland*, 331 A.2d 640 (ME. 1975).

The conduct in question in this case is a teacher slapping a student in the face. We believe that a teacher slapping a student would generally be considered misconduct. State law prohibits school personnel from administering corporal punishment to discipline a student. Md. Code Ann., Educ. §7-306(a); COMAR 13A.08.01.11E. Local Board Rule 506.05 likewise prohibits corporal punishment in Baltimore City Public Schools. The BCPSS 2006-2007 Information Guide defines corporal punishment as "any deliberate striking, paddling, application of an object or body part against the body of a student, or any other physical punishment used as a corrective or retaliatory measure against a student.[4]

Although corporal punishment is prohibited, State law recognizes that there may be times when school personnel need to use physical force to diffuse a situation. Section 7-307(a) of the Education Article provides that teachers may take reasonable action necessary to prevent violence on school premises, including intervening in a fight or physical struggle that takes place in the teacher's presence. The degree and force of the intervention, however, may only be what is reasonably necessary to prevent violence, restore order and protect the safety of the combatants and surrounding individuals. §7-307(b). The BCPSS 2006-2007 Information Guide also states there are circumstances and conditions under which BCPSS employees are permitted to appropriately touch students, such as protecting oneself and maintaining a safe and orderly school environment.[5] (Brown Ex. 18).

The question, therefore, is whether Appellant's action of slapping the student was reasonably necessary to protect herself. In other words, did the slap amount to self defense.

The ALJ found that Appellant's actions were corporal punishment and not self defense. The ALJ found the self defense argument weak because there was no indication that the student acted in a manner to intentionally touch or injure the Appellant, even though the student acted disrespectfully. The ALJ explained that Appellant never testified that Student B touched her or attempted to touch her, although Student B did step on her toes. (ALJ Proposed Decision at 12). Rather, Appellant testified that "[Student B] stuck the watch in my face and got closer and in my reflex I smacked her in the

[4]BCPSS published this definition in the 2006-2007 Information Guide. The language is no longer used in that Guide and has not been adopted as a local board rule or policy. (Response to Exceptions).

[5]The local board refers to the requirements that govern the circumstances in which school personnel shall use exclusion, restraint, or seclusion, and argues that Appellant's conduct violated those requirements. These types of student behavior interventions are specifically addressed in COMAR 13A.08.04 and in BCPS Rule 506.06. Appellant's conduct, however, does not fit into any of these categories. *See* COMAR 13A.08.04.02.

face." (ALJ Proposed Decision at 12). In addition, the principal reported that Appellant told her she slapped Student B due to "reflex, tension, and build-up." (CEO 3).

During a demonstration of the slap at the OAH hearing, the following exchange took place:

> Appellant: So this is the right hand then that she used over here, sticking it in my face like that.
>
> ALJ: The question is: Your reflex was to slap her in the face, not to knock her hand away.
>
> Appellant: It was the (sic) slap her out of the way.
>
> Counsel: But you slapped her face. You didn't remove her hand, correct?
>
> Appellant: It was so quick, I don't know.
>
> Counsel: The question was: You slapped her face. You did not remove her hand, correct?
>
> Appellant: I guess, yeah.

(T.117-118/OAH).

The ALJ also rejected Appellant's action as an acceptable form of self defense. Under the circumstances, if Appellant felt physical contact was necessary, a more reasonable action would have been for Appellant to push Student B's hand or arm away from her face, or to have moved Student B out of her way. (ALJ Proposed Decision at 12-13).

In his decision, the ALJ also relied on the fact that Appellant had been warned previously about her interactions with students. During the 2003-2004 school year, Appellant engaged in profanities with a student in front of the class and threatened to "kick his ass" (CEO 3). Appellant's 2004-2005 evaluation advised her that she needed to work to help students develop a sense of order and safety through a clearer delineation of rules, procedures, and classroom policies. (Brown Ex. 13). In addition, a memorandum from March 24, 2006 mentions another incident in which the principal did not feel that Appellant maintained a professional demeanor with her students and allowed them to run around uncontrollably in the classroom making loud noises. (CEO 4).

With regard to the use of profane language, apparently the use of such language was not uncommon between Appellant and the students. Appellant admitted during the teacher-student-parent conference that she sometimes uses profanity with the students. She also stated that Student B was

speaking and cursing at her as if they were old friends rather than as if Student B were angry with Appellant. (CEO 3).

On the other hand, Appellant argues that the slap was not corporal punishment because it was a reaction that was not intended to be a corrective or retaliatory measure. Appellant maintains, rather, that she acted in self defense in an untenable situation because (1) Appellant had her back against a brick wall; (2) she was being crowded and stepped on by the student; (3) the student had her watch up by Appellant's eye, practically touching it; (4) the student was two inches taller than Appellant and she weighed 25-30 pounds more than her; (5) the student had refused to back up despite Appellant's two oral commands that she do so; and (6) the student had acted disrespectfully and cursed at Appellant.

After reviewing the record in this case, the ALJ's decision, and after hearing the oral arguments of the parties, it is our view that the Appellant's conduct was misconduct. She deliberately struck the student with an open palm sufficiently hard to leave a red area on the student's face. It may be that the student's aggressive behavior provoked the slapping incident, but the type of provocation here does not, in our view, support a self defense argument. Self defense allows what is reasonably necessary. Appellant, we believe, went far beyond what was "reasonably necessary" here either to protect herself or to move the student back.

We note that in Maryland the teacher's conduct must bear of the teacher's fitness to teach in order to constitute misconduct. As the local board explained during oral argument, professional composure is a critical attribute to teach effectively. Moreover, the exercise of good judgment, not poor judgment, bears on that ability also. The Appellant demonstrated a complete loss of professional composure and exercised exceedingly poor judgment.

Violence in school remains a significant concern. Our school systems focus great efforts on teaching student's alternative means of dealing with conflict and how to deescalate conflict. To say the least, the Appellant's actions here undermined those efforts. We conclude that the facts of this case warrant a finding of misconduct.

Severity of Penalty

The State Board's broad powers include the modification of a penalty imposed on school system personnel by a local board. *Board of Educ. of Howard County v. McCrumb*, 52 Md. App. 507, 514 (1982). Thus, it is within our discretion to determine whether the penalty was reasonable or too harsh here given the circumstances of the case.

Appellant argues that assuming the ALJ was correct in finding that Appellant engaged in misconduct when she slapped Student B, the ALJ erred in finding that dismissal was the appropriate punishment in light of Appellant's length of employment, quality of teaching, and value to the students. Appellant notes that she was a teacher for nine years outside of the State of Maryland prior

to her employment with the Baltimore City Public School System (BCPSS)(T.99-100/Kessler), that she began her employment with BCPSS for the 2000-2001 school year and has received either satisfactory or proficient overall ratings in her annual evaluations from that time through the 2007-2008 school year (ALJ Proposed Decision at 7), that she holds an Advanced Professional Certificate in the certification areas of Administrator I and Elementary Education 1-6 and Middle School, with 9 ancillary credits in Reading, and that she has had no other incidents of inappropriate physical contact throughout her entire teaching career. (Exceptions at 10-11).

The ALJ took Appellant's teaching history into consideration in determining the penalty in this case. Nonetheless, the ALJ determined that Appellant was unfit to teach and that termination was appropriate. The ALJ highlighted the fact that Appellant slapped a sixth grade female student across the face at a time and location where other students and an adult witnessed her actions, and that the slap was hard enough to make the student cry and leave an area on the student's face red. The ALJ explained that this incident undermined the confidence that parents, students, and school officials have in Appellant's ability to maintain a safe and healthy learning environment at the school. The ALJ also noted that Appellant had been warned in the past regarding her unprofessional interactions with parents and/or students, her need to help students develop a sense of order and safety, and her responsibility to maintain a safe classroom environment. (ALJ Proposed Decision at 13-14).

In Exception 8 and in oral argument, Appellant maintained that the ALJ failed to consider events that occurred after the slapping incident in making his decision and, therefore, erred in his determination that Appellant was unfit to teach. Specifically: (1) Appellant was continuously employed by BCPSS during the 2007-2008 school year pending the disposition of the Statement of Charges; (2) BCPSS notified Appellant that she was eligible for a promotion to an educational associate position; (3) BCPSS notified Appellant that an additional endorsement of Administrator I was being placed on her Advanced Professional Certificate; (4) BCPSS promoted Appellant to an IEP Team Associate position; and (5) Appellant received an overall rating of Satisfactory on her 2007-2008 Annual Evaluation Report. On that report, her evaluator stated:

> [Appellant] has demonstrated leadership skills and a great willingness to learn the IEP process as a new ITA this school year. Her planning reflects knowledge of instructional strategies. She makes effective recommendations and usually carries out responsibilities consistent with school system policy. She works harmoniously and professionally with school staff to provide maximum educational benefits to students/teachers/staff. She routinely completes reports, forms, and documents in a timely manner to meet federal and state requirements.

(App. Ex. 7).

The local board maintains that there is nothing odd about the fact that the Appellant was continuously employed by the school system after the incident because the actual termination did not take place until May 13, 2008 when the local board ruled on the misconduct charge.

Jerome Jones, Labor Relations Associate for the local board, testified at length the OAH hearing about how the school system handles placement of teachers against whom charges are pending. He explained that it was possible for Appellant to be placed in another job in the school system due to the manner in which the personnel files are maintained between the time the CEO issues a Statement of Charges and when the local board takes action on the Statement of Charges. (T.34/OAH). He testified, however, that in the four or five other cases of which he was aware, some "have been placed on administrative leave with pay. . . . They're not teaching." (T. 42/OAH). He explained further "Two were suspended, recommended for suspension prior to dismissal, and . . .one was put on administrative leave and one was put in a different area working that they should not come in contact with children." (T. 44). He testified, also that under BCPSS policy concerning suspension procedures for professional employees, Rule 407.04(A) stated:

> 'if the CEO determines that allowing the employee to continue in the workplace would be disruptive to the workplace or the employee's presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, the CEO shall suspend the employee without pay or suspend the employee without pay pending termination.'
>
> Now, in Ms. Brown's case, the CEO did not choose to suspend her, correct?
>
> A. Yes, Ms. Brown was not suspended.

(T. 50/OAH).

Mr. Jones did not have any knowledge of the facts and circumstances concerning the Appellant's case or why she continued to teach during the pendency of charges. (T.42/OAH). There are no other facts in the record to explain how or why Appellant was allowed to continue to teach. Appellant argues that this demonstrates that the school system trusted her. There is no evidence in the record to support or contradict that proposition. It is a mere supposition.

The school system's transfer and continued employment of Appellant for a full year after the filing of a charge of misconduct causes serious concerns for us. We might understand this action if there were any doubt that the Appellant slapped Student B, but there was not. The Appellant admitted she did so soon after the event; a parent witnessed the slap. There were many other ways the school system could have and possibly should have handled the placement of this teacher. We express here

our concern that the then - CEO did not act in accordance with the policies governing the placement of teachers during the pendency of charges. We do not know, of course, why that occurred.

The fact that the school system transferred her to another school and thereafter promoted her caused us initially to question the severity of the penalty the local board ultimately imposed. We considered Appellant's argument that the school system's actions demonstrated that they "trusted" her and therefore had confidence in her teaching ability. We considered the local board's explanation that the Statement of Charges records were kept separate from the school system's personnel records. In the end, we returned to the fact that slapping the student here was misconduct that bore heavily on the Appellant's fitness to teach. Because that conduct so seriously implicates her fitness to teach, we concluded that dismissal was the appropriate penalty.

Exceptions to the ALJ's Proposed Decision

Appellant has raised several Exceptions to the ALJ's Proposed Decision, we address them below.

Exception #1

Appellant argues that Finding No. 10 fails to accurately reflect how close Student B came to Appellant's eye when the student put a watch up towards Appellant's face for a second time. Finding No. 10 states:

> The Appellant again directed B to back up. However, instead of backing up, B again brought the watch towards the Appellant's face, placing it very close to the Appellant's eyes.

(ALJ Proposed Decision at 6).

When questioned by the ALJ, Appellant testified that the watch was almost touching her nose and eyes. (T.116/OAH). We believe that the ALJ's description of the watch coming "very close" to Appellant's eyes conveys the same point as it "almost touching" them. In addition, while the Appellant seems to suggest that the ALJ did not understand the proximity of the watch to Appellant's eyes, the ALJ clearly understood the distance based on the physical demonstration given by the Appellant and the ALJ's questions on the subject. (T.116/OAH).

Exception #2

Appellant maintains that the ALJ failed to consider the relative weight and height of Student B and Appellant in determining whether Appellant acted in self defense. Appellant is five foot, six inches tall (5'6"). Student B is five foot, eight inches tall (5'8") and, at the time of the incident, weighed approximately 25-30 pounds more than Appellant. (T. 31/Kessler; T.124-125, 129/OAH).

It is our view that the student's weight and size were not factors in this incident.

Exception #3

Appellant argues that the ALJ erred in Finding No. 14 because the record contains no testimony or evidence that Student B had a "red mark" on her face after Appellant slapped her.

Finding No. 14 states: "Approximately five minutes after the slapping incident, both the principal's secretary and Ms. Walker observed B to have a red mark on the side of her face where she had been slapped." (ALJ Proposed Decision at 7). While it is true that the witnesses did not state that the student had a "red mark", they did testify that one side of the student's face was red after the incident. (T.46, 49, 51, 59-60/Kessler). It is inconsequential whether Student B's face had a red mark or appeared red. The descriptions convey the same concept, that the slapped facial area was red and looked different than it had before.

Exception #4

Appellant claims that the ALJ erred in Finding No. 15 by finding that Appellant slapped Student B as a result of "reflex, tension, and build-up." (ALJ Proposed Decision at 7). Appellant argues that Appellant never used those words as a reason for the slap, stating instead that it was an automatic response. (Brown Ex. 3; OAH-T.102-103/OAH; T.122, 124, 139, 142-44/Kessler).

The ALJ's finding relied on the principal's testimony and the principal's letter to the Human Resources Office recommending Appellant's dismissal wherein the principal stated that Appellant told her after the incident that the slap was a result of reflex, tension, and build-up. (T.75/Kessler; T.80/OAH; Bd. Ex. 6). Although Appellant denied that she stated that the ALJ obviously found that testimony of the principal to be more credible.

Exception #5

Appellant maintains that the ALJ erred in Finding No. 17 where he noted that Appellant received an unsatisfactory rating for professional responsibility in her 2003-2004 annual evaluation report by failing to interact professionally, ethically, legally, and/or respectfully with parents and/or students. (ALJ Proposed Decision at 7). Appellant argues that the finding is incomplete because the ALJ omitted the fact that the Appellant was placed on a Performance Improvement Plan (PIP) as a result of the rating, that she improved her performance within weeks, and that the PIP was terminated because Appellant met the objectives outlined in the plan.

We do not think the ALJ's failure to make a finding regarding the PIP and Appellant's improvement is of any consequence here. Whether or not Appellant had a PIP and showed improvement sufficient to have the PIP removed does not negate the fact that she received the rating in that area on her annual evaluation, and therefore had notice and warning regarding her interactions

with students. It was this notice and warning, as well as future notice and warning in 2005 evaluation and in a 2006 memorandum, combined with the behavior in this case, which pointed to the ALJ's conclusion that Appellant is unfit to teach and that termination is appropriate.

Exception #6

Appellant claims that in Finding No. 18, the ALJ focused only on those comments in Appellant's 2004-2005 annual evaluation that supported his conclusion that Appellant is unfit to teach, and ignored the positive comments. Finding No. 18 states as follows:

> On the Appellant's 2004-2005 annual evaluation report, the Appellant received a comment which indicates that student misbehavior needs to be dealt within a consistent manner to avoid repeated occurrences. Further, the principal of the School commented that the Appellant needs to work to help students develop a sense of order and safety through a clearer delineation of rules, procedures, and classroom policies.

(ALJ Proposed Decision at 7).

The ALJ made this finding because, as with the finding above, it was evidence that Appellant had notice and warning of her deficiency in a particular area dealing with students. It was not necessary for the ALJ to make findings regarding every aspect of Appellant's evaluation. Although the ALJ did not point out certain positive comments, the ALJ found that the Appellant had received either satisfactory or proficient overall ratings on her annual evaluation reports from 2000 through 2008. (ALJ Proposed Decision at 7, Finding No. 16).

Exception #7

Appellant argues that the ALJ failed to take into consideration Appellant's work performance for the 2005-2006 school year in Finding No. 19. Finding No. 19 states:

On March 28, 2006, the Appellant received a memorandum from the School's principal addressing dangerous student behavior occurring in the Appellant's classroom and warning the Appellant that it is her professional responsibility to maintain an appropriately organized, productive, and safe classroom environment.

(ALJ Proposed Decision at 7-8). Appellant argues that the ALJ's reliance on this memorandum is misplaced given that Appellant received an overall rating of Proficient on her 2005-2006 annual evaluation.

Again, whether or not Appellant achieved periodic success in her performance does not negate the fact that at one point in time Appellant received the memorandum referenced in Finding No. 19. The ALJ found that this memorandum placed Appellant on notice regarding her need to maintain a safe classroom environment.

CONCLUSION

For all the reasons stated here, we affirm the decision of the ALJ. We have added additional facts contained in the record as set forth in the Factual Background and Analysis section of this Opinion.

James H. DeGraffenreidt, Jr.
President

Mary Kay Finan

S. James Gates, Jr.

Madhu Sidhu

Guthrie M. Smith, Jr.

Donna Hill Staton

Ivan C.A. Walks

Kate Walsh

Dissent:

In my view, the penalty must be mitigated because of the school system's actions during the year the charges were pending. While the system articulated the need to provide a safe, secure environment for children, it also recognized the work of the Appellant by transferring her to a new school to teach children, giving her a good evaluation, and promoting her to an IEP Team Associate. This dissent is not to support the actions of the Appellant but to call into question the actions of the system which appeared contradictory to policy. It is my opinion that the termination be reversed and the case remanded to the local board for reconsideration of the penalty.

Charlene M. Dukes
Vice President

September 21, 2009

SHARON E. BROWN	*	BEFORE DANIEL ANDREWS,
APPELLANT	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF MARYLAND OFFICE OF
BALTIMORE CITY BOARD OF	*	ADMINISTRATIVE HEARINGS
SCHOOL COMMISSIONERS	*	OAH No.: MSDE-BE-01-08-33126

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE

On June 20, 2007, the Baltimore City Board of School Commissioners (Local Board)[1] notified Sharon E. Brown (Appellant) of a recommendation that she be dismissed as a certificated teacher in the Baltimore City Public School System (BCPSS) for misconduct under Annotated Code of Maryland, Education Article, Section 6-202(a) (2008).[2] Further, the notification advised the Appellant that she had a right to request a hearing before a duly appointed hearing officer of the Local Board.

The Appellant requested a hearing and on March 20, 2008. Hearing Officer Robert Kessler conducted a hearing during which the Appellant was present and represented by counsel. On or about April 25, 2008, after considering the evidence presented, Hearing Officer Kessler issued a

[1] COMAR 13A.01.05.01B(6) defines "local board" as the board of education for a county including the Baltimore City Board of School Commissioners.
[2] All future references to the Annotated Code of Maryland, Education Article shall be as the "Education Article" and the version found in the 2008 Replacement Volume.

written decision and recommendation that the Appellant remain in her position and no further action be taken by the Local Board.

On May 13, 2008, the Local Board reviewed the recommendation by Hearing Officer Kessler and, contrary to his recommendation, unanimously voted to uphold the original recommendation. Consequently, on May 13, 2008, the Local Board issued an order terminating the Appellant from her employment with the BCPSS.

On June 12, 2008, the Appellant filed her initial appeal to The Maryland State Department of Education (MSDE or State Board)[3] challenging the Local Board's decision of May 13, 2008 The Appellant alleged that the Local Board failed to provide a rationale for rejecting the recommendation of Hearing Officer Kessler. On July 7, 2008, the Local Board issued an amended order terminating the Appellant from her employment with the BCPSS and provided an explanation for rejecting the recommendation of Hearing Officer Kessler.

On July 18, 2008, the Appellant noted a second appeal to the State Board. On or about September 3, 2008, the State Board forwarded the Appellant's appeal to the Office of Administrative Hearings (OAH) for a contested case hearing. On November 7, 2008, Administrative Law Judge (ALJ) Daniel Andrews conducted a telephone pre-hearing conference during which the respective parties identified the legal issue to be litigated as well as relevant exhibits and witnesses to be presented during the contested case hearing.

On December 18, 2008, ALJ Andrews conducted a contested case hearing, at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Code of Maryland Regulations (COMAR) 13A.01.05.07. The Appellant was present and was represented by Keith J. Zimmerman, Esquire. Lisa Merchant, Esquire, represented the Local Board.

[3] COMAR 13A.01.05.01B(10) defines "State Board" as the State Board of Education.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the State Board, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008); COMAR 13A.01.05; and COMAR 28.02.01.

ISSUE

Did the Appellant commit misconduct under Education Article § 6-202(a) and if so is termination of the Appellant's employment as a teacher in the BCPSS appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

A copy of the exhibits presented during the hearing before Hearing Officer Kessler, as well as a transcript of that hearing was made a part of the record for the contested case hearing conducted by ALJ Andrews. COMAR 13A.01.05.07B. The following is list of the record which was created during the hearing before Hearing Officer Kessler:

- Hearing Transcript, dated March 20, 2000
- Local Board Exhibits:

  CEO Exhibit 2: Photo of Coldstream Park Elementary/Middle School (School) entrance

  CEO Exhibit 3: May 21, 2007 letter to Human Resources

  CEO Exhibit 4: March 24, 2006 Memo
- Appellant's Exhibits:

  Brown Exhibit 1: 2005-2006 School Year Evaluation

  Brown Exhibit 2: May 17, 2007 student statement

  Brown Exhibit 3: May 17, 2007 [Appellant] statement

  Brown Exhibit 4: Incident Report

  Brown Exhibit 5: May 23, 2007 Investigative Report

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Brown Exhibit 7: [Appellant's] tenure letter

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Testimony

The Local Board presented the testimony of Jerome F. Jones, BCPSS, Labor Relation Associate, and Tracey Roberts (formerly Tracey Thomas), former principal of the School. The Appellant testified on her own behalf and did not present any other witnesses.

FINDINGS OF FACT

After considering the entire administrative record as well as all evidence presented during the contested hearing, I find the following facts by a preponderance of the evidence:

1. The Appellant has been employed by the BCPSS as a certified teacher since August 2000.

2. On May 17, 2007, the Appellant was assigned as a classroom teacher at the School.

3. Prior to May 17, 2007 and to the present, the Local Board has an established rule that schools shall be governed without corporal punishment.

4. On May 17, 2007, the Appellant was performing her duties as a teacher at the School and at one point in time during the day was engaged in some exercises with several students outside the school building.

5. One of the students participating in the outside activity was a sixth grade female student named B.[4]

6. Toward the end of the outside activity, the Appellant began calling all the students back into the school building. At this time, the Appellant was at a set of double doors which led into the school, holding one of the doors open to allow the students to reenter the school building.

7. At this time B asked the Appellant what time it was. In response, the Appellant stated that she did not know.

8. B responded to the Appellant by indicating that B would check her own watch. In doing so, B brought the watch up towards and in close proximity to the Appellant's face. The Appellant directed B to back up because B was crowding the Appellant and had stepped on the Appellant's toes.

9. B responded to this direction by telling the Appellant to "shut the fuck up."

10. The Appellant again directed B to back up. However, instead of backing up, B again brought the watch towards the Appellant's face, placing it very close to the Appellant's eyes.

11. In response to B putting the watch so close to the Appellant's face and eyes, the Appellant reacted by slapping B across the face with an open hand.

[4] For confidentiality purposes this student's name shall only be referenced by her first initial.

12. The slapping incident was observed by D'Andra Walker, another student's parent, who also observed B, after being slapped by the Appellant, begin crying and walk away from the Appellant.

13. Within minutes of observing the Appellant to slap B, Ms. Walker reported the incident to the School's principal's office. At the time the principal's secretary was present and requested B to come to the principal's office.

14. Approximately five minutes after the slapping incident, both the principal's secretary and Ms. Walker observed B to have a red mark on the side of her face where she had been slapped.

15. The Appellant admitted that she slapped B across the face. The Appellant also explained that she slapped B as a result of "reflex, tension, and build-up."

16. Since 2000 through 2008 the Appellant has received either satisfactory or proficient overall ratings on her annual evaluation reports.

17. On the Appellant's 2003-2004 annual evaluation report, the Appellant received an unsatisfactory rating for professional responsibility by failing to interact professionally, ethically, legally, and/or respectfully with parents and/or students.

18. On the Appellant's 2004-2005 annual evaluation report, the Appellant received a comment which indicates that student misbehavior needs to be dealt with in a consistent manner to avoid repeated occurrences. Further, the principal of the School commented that the Appellant needs to work to help students develop a sense of order and safety through a clearer delineation of rules, procedures, and classroom policies.

19. On March 28, 2006, the Appellant received a memorandum from the School's principal addressing dangerous student behavior occurring in the Appellant's classroom and warning

the Appellant that it is her professional responsibility to maintain an appropriately organized, productive, and safe classroom environment.

DISCUSSION

In this case the Local Board dismissed or terminated the Appellant for misconduct under Education Article section 6-202 because she slapped a student across the face in violation of Local Board rules prohibiting corporal punishment. The Appellant contests her termination from employment as a teacher by alleging that she was acting in self defense to protect herself from the student. Additionally, in light of the fact that the Appellant has no prior history of striking students and has enjoyed favorable evaluations during her employment, the Appellant contends that termination of her employment is too drastic a disciplinary action.

The Applicable Law

Section 6-202 of the Education Article provides the framework under which a teacher may be suspended or dismissed. Section 6-202(a) states:

> (1) On the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant for:
>
> (i) Immorality;
> (ii) Misconduct in office, including knowingly failing to report suspected child abuse in violation of § 5-704 of the Family Law Article;
> (iii) Insubordination;
> (iv) Incompetency; or
> (v) Willful neglect of duty.
>
> (2) Before removing an individual, the county board shall send the individual a copy of the charges against him and give him an opportunity within 10 days to request a hearing.
>
> (3) If the individual requests a hearing within the 10-day period:
>
> (i) The county board promptly shall hold a hearing, but a hearing may not be set within 10 days after the county board sends the individual a notice of the hearing; and
> (ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and to bring witnesses to the hearing.

(4) The individual may appeal from the decision of the county board to the State Board.

In an appeal of a suspension or dismissal of a certificated employee pursuant to Education Article Section 6-202 and COMAR 13A.01.05.05F provide the following:

(1) The standard of review for certificated employee suspension or dismissal actions shall be de novo as defined in F(2) of this regulation.

(2) The State Board shall exercise its independent judgment on the record before it in determining whether to sustain the suspension or dismissal of a certificated employee.

(3) The local board has the burden of proof by a preponderance of the evidence.

(4) The State Board, in its discretion, may modify a penalty.

Accordingly, on behalf of the State Board and on the record before me, I am exercising my independent judgment and discretion to determine whether the Local Board has established by a preponderance of the evidence that Appellant committed misconduct in office and whether termination of her employment is an appropriate sanction.

Analysis

In this case a primary legal issue is how Education Article Section 6-202 defines "misconduct in office." In *Resetar v. State Board of Education*, 284 Md. 537 (1979), the Maryland Court of Appeals for the first time addressed this legal issue. Before defining "misconduct" as contemplated by Education Article Section 6-202, the *Resetar* Court engaged in a comprehensive review of how "misconduct" has been defined or applied from a broad variety of sources, including cases from other jurisdictions, Black's Law Dictionary, and a Maryland case defining the term in the context of the unemployment insurance statute. The type of conduct reviewed in *Resetar* covered several broad areas including but not limited to sexual misconduct, insubordination, unauthorized absences, incompetency, unprofessional conduct, intemperance, gambling, and use of profane language. *Resetar, 284 Md.* at 556-561. After its review of the law and the broad range of

conduct which may be considered "misconduct", the Court in *Resetar* never clearly defined which type of "misconduct" is contemplated by Education Article § 6-202, but found relevant that whatever the transgression by a teacher, the conduct must bear upon a teacher's fitness to teach. *Id.* at 561.

The conduct at issue here occurred on May 17, 2007, when the Appellant, while employed as a teacher at the School, slapped a sixth grade female student, identified as B, across the face. The fact that the Appellant slapped the student is not in question because the Appellant admits that she slapped the student. However, the Appellant attempts to defend her conduct by explaining that she was acting in self defense.

The circumstances surrounding this slapping incident are not disputed. The Appellant was outside the school and engaged in an outside activity with several students including B. Eventually it became time for the students to end their activity and re-enter the school. The Appellant, while standing at a set of double doors which led into school, held open one of the doors, and began calling the students back into school. At this time, B approached the Appellant and asked the Appellant what time it was. The Appellant indicated that she did not know the time. In response, B indicated that she would check her own watch. In doing so, B brought the watch up towards and in close proximity to the Appellant's face. The Appellant directed B to back up because B was crowding the Appellant and had stepped on the Appellant's toes. B responded in a disrespectful manner telling the Appellant to "shut the fuck up". Further, B did not back up but instead brought the watch towards the Appellant's face, placing it very close to the Appellant's eyes. In response to this act by B, the Appellant slapped B across the face. The Appellant's conduct of slapping B across the face was observed by D'Andra Walker, another student's parent. As a result of the Appellant slapping B, Ms. Walker observed B to begin crying and walk away from the Appellant. Ms. Walker reported the incident to the school's principal's office and approximately five minutes

after the incident both Ms. Walker and the principal's secretary observed B to have a red mark on the side of her face where she was slapped by the Appellant. While the Appellant would like to characterize her response as self defense, I am not persuaded that her conduct was self defense.

Generally, under Maryland law a "principal, vice principal, or other employee may not administer corporal punishment to discipline a student in a public school in the State." Education Article § 7-306(a).[5] Further, each county board is required to adopt regulations "designed to create and maintain within the schools... the atmosphere of order and discipline necessary for effective learning." Education Article § 7-306(c)(1). Finally, the regulations adopted by a county board under subsection (c)(1) "shall provide for educational and behavioral interventions, counseling, and student and parent conferencing." Educational Article §7-306(c)(2). Consistent with the mandate of Education Article Section 7-306, the Local Board adopted specific rules, applicable to schools and personnel within their jurisdiction, which implement the State policy against corporal punishment." Local Board Rule 506.05 provides "[t]he schools shall be governed without corporal punishment. Further, Local Board Rule 506.06 provides that "[s]chool personnel are encouraged to use an array of positive behavior interventions, strategies, and supports to increase or decrease targeted student behaviors." The overall impact of the above State statutes and regulations and Local Board rules is that a teacher may not use physical punishment, including slapping a child, to discipline a child or to modify a child's behavior. In this case, by slapping B across the face, the Appellant violated the prohibition against corporal punishment and committed misconduct.

Despite the prohibition against using corporal punishment, the Appellant argues that she was defending herself when she slapped B. However, this particular argument is tenuous at best. First, although the student was acting impetuously and disrespectfully, there is no indication that the Student was acting in manner to intentionally touch or injure the Appellant. Shortly after the

[5] COMAR 13A.08.01.11E also provides that "[c]orporal punishment may not be used to discipline a student in a public school in the State."

incident and on the same day, the Appellant wrote out a statement explaining the event which led up to the slapping. In this statement, the Appellant never stated that B touched her or even attempted to touch her. The Appellant's actual words were "she stuck the watch in my face and got closer and in my reflex I smacked her in the face." Brown Exhibit 3. Secondly, during the Appellant's testimony before Hearing Officer Kessler, the Appellant was equivocal on whether B actually made physical contact with her. In a colloquy between the Appellant and her counsel the Appellant made the following statements:

> [Mr. Zimmerman] Q. Did B ever actually touch you in the eye with the watch?
>
> [Appellant] A. She touched me up in my face right here by my eye here.
>
> [Mr. Zimmerman] Q. Did it actually connect with your face?
>
> [Appellant] A. Well, this is my face, so it didn't get in my eye but it got right here in front of my eye where I was able to see the watch, and I swatted her out of the way.

Hearing Transcript, dated March 20, 2008, page 125.

Further, during the hearing before me the Appellant never testified that B had physically touched her or was attempting to strike her. Instead the Appellant merely demonstrated that B came very close to her eye with the watch. The Appellant reiterated that her response was to slap B across the face.

Despite how close B brought the watch to the Appellant's face, it was unreasonable for the Appellant's to have characterized her response as an acceptable form of self defense. Under the circumstances the most reasonable form of physical contact, if physical contact was justified at all, would have been for the Appellant to push B's hand or arm away from her face. Such a course of action would have resolved the Appellant's perceived danger to her eye and prevented the use of corporal punishment, presumably in front of other students and adults. If the Appellant had an opportunity to slap B in the face, then she also had an opportunity to cautiously move B away from

her instead of slapping B. I recognize that the Appellant gave B several verbal commands to back away from her that went unheeded; however, teachers cannot use corporal punishment against students to try to modify student behavior. Only under rare circumstances, not present here, where some form of physical contact with a student is required, may a teacher have contact with a student. Even then, a teacher must use the least threatening and least potentially injurious contact which maintains the integrity of the teaching environment. For the reasons just discussed and based upon the circumstances presented in this case, I find that the Appellant's conduct, to slap B, was an unreasonable and unwarranted exercise of corporal punishment.

Having concluded that the Appellant engaged in misconduct by violating the State and school prohibition against corporal punishment, the remaining issue is whether termination of her employment is an appropriate sanction. Again, as found by the *Resetar* Court the salient point is whether the misconduct in this case bears upon the Appellant's fitness to teach.

As discussed above, the Appellant slapped B, a sixth grade female student, across the face causing her to cry. Additionally, approximately five minutes after the incident B still had a red mark on her face from the slap. Finally, it is clear that the Appellant slapped B at time and location where several other students as well as an adult saw the misconduct of the Appellant. Under these circumstances it is clear that Appellant engaged in conduct, which not only caused an injury to B, but did so in a manner that portrayed the Appellant as unable to maintain a safe and healthy learning environment at the School. This fact undermines any confidence, in the eyes of parents, students and school officials, that the Appellant can conduct herself in manner which fosters a safe and healthy learning environment.

Since the year 2000 through 2008 the Appellant has received an overall rating on her annual evaluation reports of satisfactory or proficient. Further, a review of the Appellants annual evaluation reports reflects that the Appellant has never physically struck a student. However, this

same review also reveals that in 2004, the Appellant was warned about failing to interact professionally, ethically, legally, and/or respectfully with parents and/or students. Additionally, in 2005, the Appellant was advised that she needs to work to help students develop a sense of order and safety through a clearer delineation of rules, procedures, and classroom policies. Finally, in 2006, the Appellant was again warned that it was her professional responsibility to maintain an appropriately organized, productive, and safe classroom environment. The effect of these repeated warnings and the misconduct in this case all point toward the conclusion that the Appellant is unfit to teach and that termination of her employment is appropriate.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Local Board has established by a preponderance of the evidence that the Appellant committed misconduct in office and termination of her employment with BCPSS is appropriate. Education Article § 6-202 and COMAR 13A.01.05.05F.

PROPOSED ORDER

It is proposed that the decision of the Baltimore City Board of School Commissioners to terminate the Appellant's employment for misconduct in office under Education Article Section 6-202 be **UPHELD**.

March 9, 2009
Date Decision Mailed

Daniel Andrews /MKS
Daniel Andrews
Administrative Law Judge

#102730

NOTICE OF RIGHT TO FILE OBJECTIONS

Any party adversely affected by this Proposed Decision has the right to file written objections within fifteen days of receipt of the decision; parties may file written responses to the objections within fifteen days of receipt of the objections. Both the objections and the responses shall be filed with the Maryland State Department of Education, c/o Sheila Cox, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. COMAR 13A.01.05.07F. The Office of Administrative Hearings is not a party to any review process.

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SHARON E. BROWN	*	BEFORE DANIEL ANDREWS,
APPELLANT	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF MARYLAND OFFICE OF
BALTIMORE CITY BOARD OF	*	ADMINISTRATIVE HEARINGS
SCHOOL COMMISSIONERS	*	OAH No.: MSDE-BE-01-08-33126

* * * * * * * * * * * * *

FILE EXHIBIT LIST

A copy of the exhibits presented during the hearing before Hearing Officer Kessler, as well as a transcript of that hearing was made a part of the record for the contested case hearing conducted by ALJ Andrews. COMAR 13A. 01.05.07B. The following is list of the record which was created during the hearing before Hearing Officer Kessler:

- Hearing Transcript, dated March 20, 2000
- Local Board Exhibits:

  CEO Exhibit 2: Photo of Coldstream Park Elementary/Middle School (School) entrance

  CEO Exhibit 3: May 21, 2007 letter to Human Resources

  CEO Exhibit 4: March 24, 2006 Memo
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